United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1039

to be argued by KENNETH A. HOLLAND

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN THE MATTER OF

MICHAEL F. COIRO, JR.

ATTORNEY FOR THOMAS DE SIMONE,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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I N D E X

C I T A T I O N S

Cases:

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ISSUE PRESENTED

Whether appellant's intentional failure to appear for trial on two separate occasions pursuant to court order sufficed to warrant his conviction for criminal contempt.

STATUTE AND RULES INVOLVED

Title 18, United States Code, Section 401, reads in pertinent part:

> A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as --
>
> * * * * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42(b), Federal Rules of Criminal Procedure provides:

> (b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Rule 7, Individual Assignment and Calendar Rules of United States District Court for the Eastern District of New York provides:

> Conference 'After a case has been assigned, the judge may direct the attorneys for each party to meet with him to discuss the case informally, to entertain oral motions and, to the extent possible and desirable, to discuss settlement or to set a schedule for the case, including for discovery, pre-trial and trial.

STATEMENT

On January 16, 1975, pursuant to a hearing on a show cause order issued on December 9, 1974, why appellant should not be held in contempt of court under 18 U.S.C. §401(3) and Rule 42(b), F.R.Crim.P., United States District Judge John Bartels of the United States District Court for the Eastern District of New York assessed against appellant, an attorney, costs of $1,000 for his failure to appear at trial as retained counsel for the defendant in the case of United States v. Thomas De Simone, 74 Cr. 336; the failure to appear occurred on November 25, 1974 and December 2, 1974, both dates having been set for trial by the district court pursuant to local Rule 7, Individual Assignment and Calendar Rules of United States District Court for the Eastern District of New York.

The facts leading to the contempt ruling may be summarized as follows:

1. On May 2, 1974, appellant commenced the representation of Thomas De Simone in a criminal matter for violations of 18 U.S.C. §§549, 659 and 1951 (theft from interstate shipment). The case went to trial by jury on October 1, 1974 and continued until October 3, 1974, whereupon a mistrial was declared after the jurors were unable to reach a verdict (A. 2). On this same date, with government counsel and appellant present, a new trial

was ordered to commence on November 18, 1974.[1] Pursuant to agreement made two or three days after October 3, 1974, the November 18, 1974 date for commencement was adjourned to November 25, 1974.[2] On November 20, 1974, appellant contacted Judge Bartels' chambers and spoke with his law clerk. Appellant requested a postponement of several weeks in the De Simone case on the ground that he was presently engaged in the trial of People of the State of New York v. John Cerverizzo, et al., No. 965-74, and would not be available for trial on November 25, 1974. A written affirmation dated November 22, 1974, was tendered to the district court by appellant alleging that appellant would be unavailable for trial due to his state court engagement. The trial court first saw the affirmation on November 25th when the defendant gave a copy to Judge Bartels.[3] This request was denied (A. 10).

1/ The transcript of the trial of October 3, 1974, reflects that the new trial was to commence on October 18, 1974 (Govt. App. 2), however, the docket entry indicates that the new trial was to commence on November 18, 1974 (A. 2). Additionally, Judge Bartels, at the show cause hearing, referred only to the November 18, 1974 date as the original agreed upon date for commencement of the trial (A. 9).

2/ See transcript of November 25, 1974 (Govt. App. 5).

3/ (Govt. App. 5-6, 10).

On November 25, 1974, Judge Bartels called the case of United States v. Thomas De Simone and appellant failed to appear as ordered. On that same date, after appellant failed to appear at trial, the court indicated that appellant's failure to appear would be taken up with the district court's Board of Judges and that appellant should be notified of the December 2, 1974 date (Govt. App. 7-8). As a result of appellant's failure to appear, the trial date was adjourned until December 2, 1974, and appellant was notified of the new trial date by certified mail (A. 11). On December 2, 1974, the De Simone case was again called for trial, and appellant again failed to appear. Instead, appellant filed an affirmation dated November 29, 1974, and received by the district court on December 2, 1974, the rescheduled date for trial. This paper recited that appellant would be unable to appear for trial due to his representation of John Cerverizzo in the New York State Supreme Court. This second affirmation was identical to the one filed previously by appellant in support of his request for an adjournment of the November 25th date.[4/] As a result of appellant's second failure to appear, the trial was again rescheduled for January 6, 1975. On that date, trial commenced, and on January 7, 1975, De Simone was found guilty by a jury and imposition of the sentence was adjourned to a later date (A. 3).

4/ (Govt. App. 11).

2. On December 9, 1974, seven days subsequent to appellant's second failure to obey a court order to appear for trial, the district court issued a show cause order returnable on January 16, 1975, why appellant should not be held in contempt of court pursuant to 18 U.S.C. §401(3) and Rule 42(b), F.R.Crim. P. (A. 4-6). The order to show cause recited that appellant's failure to appear, as ordered, on November 25, 1974 and December 2, 1974, seriously interferred with the district court's proceedings "in that it was unable, due to [appellant's] sudden and inexcusable failure to appear, to schedule another case for trial for the week of November 25, 1974, and also for the beginning of the week of December 2, 1974" (A. 5).[5/]

5/ The show cause order additionally recited that on November 25, 1974, the date agreed upon for commencement of trial, a court reporter, a deputy clerk of the court, the defendant, Thomas De Simone, the government attorney, and six or seven subpoenaed witnesses (some of which were out of state witnesses) were present for trial (A. 5). Additionally, Judge Bartels ordered from the Jury Commissioner at least thirteen jurors to be made available for trial on November 25, 1974. An additional request for jurors was made for December 2, 1974. On November 25, 1974, a jury was made available. Approximately twenty-two jurors, who commenced their jury duty on November 18, 1974, were allotted for the De Simone trial on November 25, 1974. These jurors, as as a result of the rescheduling of the trial, were not used for any trial. On December 2, 1974, those jurors alloted for the De Simone trial came from a new jury panel commencing on December 2, 1974 (Govt. App. 12). Each of the witnesses appearing got vouchers for $20.00 (Govt. App. 8-9).

On January 16, 1975, a hearing was held on the show cause order (A. 9-25). The court characterized the proceeding as a civil hearing, and proceeded to review the charges set forth in the show cause order with appellant. The district court emphasized that appellant had agreed to appear on November 25, 1974, the original date set for trial (A. 9); that appellant's November 20th request for an adjournment of the trial date for several weeks was denied (A. 10); and that appellant failed to appear on November 25, 1974 (A. 11). Appellant did not dispute these facts (A. 11). The court further observed:

> As a matter of fact, as I understand the statement you made to me the other day, this second case in Queens County, arose after you had already been ordered by this Court, to be ready on November 25?
>
> [Appellant]: Judge Bartels, that is absolutely correct in every respect (A. 10).

Appellant did not dispute that he additionally failed to appear, as directed by the court, on the rescheduled date for trial of December 2, 1974.

Appellant's explanation for his failure to appear on November 25, 1974, and December 2, 1974, centered upon his involvement in a trial in the New York State Supreme Court,

Queens County.[6/] Appellant stated that the state court trial commenced on November 18, 1974, and that Justice Moses Weinstein of the state court said that "he had four lawyers before him, that this was a multiple defendant case, [and] that it was going to go to trial" (A. 12). Appellant stressed that he called Judge Bartels' chambers on November 20, 1974, and notified Judge Bartels' law clerk that he would be unable to appear on November 25th because the 20th of November was the first date that he learned that the state court case would definitely proceed to trial (A. 12). Appellant emphasized that between November 18,

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6/ The state court case referred to by appellant as the justification for his failure to appear in federal district court on the two scheduled dates for trial, is People of the State of New York v. John Cerverizzo, et al., No. 965-74. This case was tried in the New York State Supreme Court, Queens County, part 10, before Justice Moses Weinstein. It was a multiple-defendant trial involving John and Robert Cerverizzo, Thomas De Sousa, Robert Velez and John Ciaccio. On April 30, 1974, an indictment was returned against the defendants for the offense of hijacking, and on May 1, 1974, the defendants plead not guilty. Appellant was originally retained to represent only one of the Cerverizzo brothers, the other to be represented by appellant's partner, Salvatore Quagliata. Due to other commitments of Quagliata, appellant represented both Cerverizzo brothers. Trial was first scheduled to commence on October 7, 1974. This trial date was postponed until October 24, 1974. The October 24th date was postponed until November 4, 1974. On both October 7, 1974, and October 24, 1974, trial was ready to commence. Appellant was not present on either of these occasions. On November 4th, appellant was present with the defendant Cerverizzo brothers, but the trial was postponed until November 18, 1974. The November 18th date became the definite starting date for the trial. On November 18, 1974, jury selection commenced. On November 25, 1974, government testimony began. The trial continued through November 29, 1974. After a two day recess, trial again commenced on December 2, 1974, and continued through December 6, 1974 (Govt. App. 13).

1974, and November 20, 1974, there were three plea negotiations, and that appellant, "Judge Weinstein, [and] the other counsel [all] thought that the case would ultimately be disposed by way of a plea" (A. 12).

Appellant further stated at the hearing that Justice Weinstein allowed his secretary to call Judge Bartels on the day after Thanksgiving, November 28, 1974, to inform him that appellant was engaged in the state court trial (A. 13), and additionally that he informed Justice Weinstein of the pending federal trial but that Justice Weinstein "ordered me to proceed anyway" (A. 21). It is not evident when this notification to Justice Weinstein was made.

3. The district court rejected appellant's explanation for disobeying two court orders to appear for trial, and emphasized that the court was unable to proceed with trials for the week of November 25, 1974, and December 2, 1974, and that the court was "definitely prevented from performing [its] duties" for the week of November 25, 1974, and was unable to schedule a trial for December 2, 1974 (A. 15-16). The district court cautioned that when such problems arise "it is customary for counsel to indicate right away" that he will be unable to appear on the scheduled date, and not wait until the last minute to notify the court of the conflict (A. 14).

As a result of appellant's failure to appear on the two court ordered dates for trial in the De Simone case, appellant was assessed costs of $1,000 as an alternative to a fine for criminal contempt. The court's justification for imposing costs as a result of appellant's failure to appear arose from Judge Bartels' decision to protect the court's orderly processes as a whole (A. 15-16). Appellant was given six months in which to pay the $1,000 (A. 24). On or about January 17, 1975, appellant paid the $1,000.

ARGUMENT

I

APPELLANT'S CONDUCT IN FAILING TO APPEAR AT TRIAL ON TWO SEPARATE OCCASIONS PURSUANT TO COURT ORDER WAS SUFFICIENT TO WARRANT HIS CONVICTION FOR CRIMINAL CONTEMPT

A. The Proceedings Against Appellant Constituted Criminal Contempt.

Despite the district court's characterization of the proceedings on the show cause order as a civil hearing (A. 9), and its imposition of costs of $1,000 as an alternative to a fine for criminal contempt (A. 23-24), we agree with appellant that the proceeding here constituted an effort to vindicate the court's authority and thus involved criminal contempt.

Where the categorization of a contempt is at issue, the inquiry centers upon whether the action taken by the court is designed to coerce the contemnor into doing what he is supposed to do, and hence is remedial, or whether the action taken has as its purpose the vindication of the authority of the court. The former uniformally constitutes a civil contempt, Shillitani v. United States, 384 U.S. 364 (1966), Nye v. United States, 313 U.S. 33 (1941); McCrone v. United States, 307 U.S. 61 (1939); the latter, criminal contempt. United States v. United Mine Workers of America, 330 U.S. 258 (1947), In Re Osborne, 344 F.2d 611 (9th Cir., 1965).

The court may clearly impose a fine or imprisonment for civil contempt. However, these sanctions are employed "as coercive [weapons] to compel the contemnor to do what the law made it his duty to do," Penfield Co. v. S.E.C., 330 U.S. 585, 590 (1947). In short, civil contempt has a remedial purpose compelling obedience to an order of the court for enforcing another party's rights or obtaining other relief for the opposing party. In essence, the contemnor "holds the keys to his prison." In Re Nevitt, 117 F. 448, 461 (8th Cir., 1902); Dobbs, Contempt of Court: A Survey, 56 Cornell L. Rev. 183, 235 (1971). A party may purge the effects of a civil contempt by compliance with the court's directive. To the contrary, in a criminal contempt, the damage is already done, and the sanctions are

imposed to vindicate an affront to the court's authority.

In the case at bar, appellant failed to appear at trial to represent a defendant in a criminal matter pursuant to two court directives that he do so. The court, though characterizing the hearing on the show cause order as one of a civil nature, imposed costs against appellant in order to protect the authority of the court (A. 15). As such, the sanction imposed rises to the level of a criminal contempt thereby insuring to appellant the right to immediate appellate review. Union Tool Co. v. Wilson, 259 U.S. 107, 111 (1922), and Bessette v. W. B. Conkey Co., 194 U.S. 324, 336-338 (1904).[7/] Cf. Bloom v. Illinois, 391 U.S. 194, 201 (1968).

7/ Exceptions to the rule that immediate appellate review is not available upon judgment of civil contempt are rare, but where they occur it is because the interlocutory nature of the order is no longer present. "Hence, civil contempts against non-parties are immediately appealable because the appeal does not interfere with the orderly progress of the main case (citation ommitted). Where the main case is effectively terminated, the contempt order may no longer be interlocutory (citation ommitted)". International Business Machines Corp. v. United States, 493 F.2d 112, 115, n. 1 (2nd Cir., 1973), cert. den., 416 U.S. 995.

The fact that the district court imposed costs rather than a fine for criminal contempt is not dispositive of whether the sanction was criminal or civil.[8/] One significant factor, although not controlling, is the characterization of the notice in the show cause order as charging civil or criminal contempt. Cf. Backo v. Local 281, United Bro. of Carpenters & Joiners, 308 F. Supp. 172, 178 (N.D. N.Y., 1969). Here, the show cause order charged criminal conduct punishable under 18 U.S.C. 401(3)

8/ In the case at bar Judge Bartels specified that appellant could accept one of two alternative means as rectification to the court for his failure to appear at trial pursuant to court order: (1) that he could be fined for criminal contempt; or (2) that he could accept costs (A. 23). Appellant chose the latter alternative. For purposes of review, however, the assessment of costs against appellant is the functional equivalent of a fine for criminal contempt, notwithstanding the district court's characterization of the show cause hearing as civil in nature. Since the sanction was imposed to vindicate the court's authority and to provide a deterrent against future similar conduct, a criminal contempt was created.

In Nye v. United States, 313 U.S. 33 (1941), the petitioners were adjudged in contempt of court for inducing an administrator of an estate to request a dismissal of a wrongful death suit in federal court. One petitioner was ordered to pay the "costs" of the contempt proceeding, including a sum to the administrator's attorney, and both petitioners were fined. The Supreme Court concluded that "[t]he fact that [petitioner] was ordered to pay the costs of the proceeding, including $500 to [the administrator's attorney], is ... not decisive [in characterizing the contempt as civil or criminal]." 313 U.S. at 42. The Court emphasized that the critical determinant was the purpose of the sanction. If the sanction is imposed to rectify the affront to the court, then the contempt is criminal. Id.

and Rule 42(b), F.R.Crim.P., the latter specifically delineating the procedures which the court should follow in indirect criminal contempts. The unalterable conclusion to be drawn from the record, therefore, is that appellant was held in criminal contempt.

Where a non-summary criminal contempt is charged, the "contemnor" should be advised, by adequate notice, of the charges so that he may prepare his defense or response. Rule 42(b), F.R.Crim.P. The contemnor is additionally entitled to a hearing on the show cause order. Id. Appellant does not challenge the procedures followed by the district court in finding him in contempt. Further, it is noteworthy that petitioner cannot claim that he was denied due process by the failure of the court to grant him a jury trial. See Bloom v. Illinois, 391 U.S. 194 (1968). The appellant made no request to have the contempt adjudicated by a jury, hence the right to a jury, if any, was waived. Judge Bartels, in providing appellant with adequate notice of the charges and conducting a hearing on the show cause order, accorded appellant his due process rights. See Johnson v. Mississippi, 403 U.S. 212 (1971).

Proceeding under the conclusion that appellant was held in criminal contempt, the crucial inquiry--and the point on which we part company with appellant--becomes whether appellant possessed the requisite criminal intent to sustain the conviction; a

necessary element of any criminal as opposed to civil contempt. This element, appellant argues, is not present. We urge the contrary position as explicated below.

B. The Conduct Of Appellant In Deliberately Failing To Appear For Trial Pursuant To Two Court Directives Is Sufficient To Sustain His Conviction For Criminal Contempt, A Necessary Element Of Which Is A Wilful And Reckless Disregard Of Court Authority.

1. Pursuant to 18 U.S.C. 401(3), the district court has the power to punish such contempt of its authority as "disobedience or resistance to its lawful writ, process, order, rule, decree, or command." In the instant case, the district court, pursuant to Rule 7 of its local rules, scheduled trial in United States v. Thomas De Simone, 74 Cr. 336, for the weeks commencing November 25, 1974, and December 2, 1974, and specifically ordered appellant to be ready for commencement of trial on these two dates (A. 5). The district court clearly had the power to punish appellant for his disobedience of these two court orders.

The right of courts to conduct their business in an untrammelled way lies at the very foundation of our judicial system. Courts necessarily possess the means for punishing for contempt when any conduct tends directly to prevent the orderly discharge of judicial functions. Wood v. Georgia, 370 U.S. 375

(1962). Lawyers are officers of the court and the courts have a duty to supervise their conduct. Saier v. State Bar of Michigan, 293 F.2d 756 (6th Cir., 1961), cert. den., 368 U.S. 947. Correspondingly, lawyers have a duty, not only to their clients, but to the courts, to attend court sessions punctually. See ABA Cannons of Judicial Ethics, No. 21. The American Bar Association's Standards for Criminal Justice emphasize the imperative that defense counsel should be punctual in attendance upon court. 9/

9/ ABA Project on Standards For Criminal Justice, The Defense Function, §1.2 (1974), provides in pertinent part:

> (a) Defense counsel should avoid unnecessary delay in the disposition of cases. He should be punctual in attendance upon court and in the submission of all motions, briefs and other papers. He should emphasize to his client and all witnesses the importance of punctuality in attendance in court.
>
> * * * * *
>
> (d) A lawyer should not accept more employment than he can discharge within the spirit of the constitutional mandate for speedy trial and the limits of his capacity to give each client effective representation. It is unprofessional conduct to accept employment for the purpose of delaying trial.

2. In order to support a conviction for criminal contempt, the contemnor's

> ... conduct must constitute misbehavior which rises to the level of an obstruction of an imminent threat to the administration of justice, and it must be accompanied by the intention on the part of the contemnor to obstruct, disrupt or interfere with the administration of justice. In Re Williams, 509 F.2d 949, 960 (2nd Cir., 1975).

Where an attorney has been held in criminal contempt of court for failure to appear at trial on time, or at all, the conduct which resulted in a subversion of the orderly processes of the court [10]

10/ Appellant conceded at the show cause hearing that he was unavailable for trial on November 25, 1974, and December 2, 1974 (A. 9-11, 16). Appellant does not, nor can he, successfully contend that the orderly process of the district court was not impaired by his failure to appear for trial pursuant to two court orders that he do so. Judge Bartels emphasized that appellant's failure to appear, as ordered, on November 25, 1974, a date agreed upon by appellant, and December 2, 1974, resulted in his inability to perform his duties under the Individual Assignment Calendar of the district court (A. 14-15). The net result of appellant's deliberate failure to appear was made unmistakably clear to appellant at the hearing:

> [T]his Court is placed in a position where [it] cannot proceed and a considerable amount of time is lost because one cannot call up the last minute and bring in a jury or other lawyers to try a case which is not set down for trial (A. 13).

must be accompanied by the requisite criminal intent manifested by a reckless and wilfull disregard of the court's order to appear, In Re Gates, 478 F.2d 998 (D.C. Cir., 1973), and must be established beyond a reasonable doubt. United States v. Peterson, 456 F.2d 1135, 1140 (10th Cir., 1972). This intent may be inferred where the attorney's conduct discloses a reckless disregard for his professional duty. Sykes v. United States, 444 F.2d 928, 930 (D.C. Cir., 1971).

Here, trial was scheduled to commence on November 25, 1974. Appellant notified Judge Bartels' chambers on November 20th that he would be unable to appear for trial and requested a postponement of several weeks due to his state court engagement. This November 20th request for the adjournment was denied by Judge Bartels. Nevertheless, appellant deliberately failed to appear, as ordered, on November 25th. The district court did not authorize or sanction appellant's non-appearance, and along with the government fully expected that appellant would appear as ordered (Govt. App. 5-6, 8).

Additionally, after appellant's failure to appear on November 25, 1974, trial was rescheduled to commence on December 2, 1974, and appellant was notified of this new date. Although appellant knew that he was required to appear on November 25th and December 2nd, the only effort to contact Judge Bartels after November 20th came on November 28, 1974, when

Justice Moses Weinstein's secretary attempted to contact Judge Bartels to explain appellant's absence in the federal district court. This contact was apparently unsuccessful. On December 2, 1974, trial in the De Simone matter was again called, but appellant failed to appear. Appellant's written affirmation, received by the district court on December 2, 1974, setting forth the same rational tendered by him on November 20, 1974, can hardly be deemed a timely notification, sufficient to permit the court to schedule another trial, and sufficient to preclude a finding that appellant was not reckless in disobeying two court directives that he appear. Cf. In Re Gates, supra, 478 F.2d 998.[11/]

11/ Appellant's reliance on In Re Farquhar, 492 F.2d 561 (D.C. Cir., 1973), is misplaced. There, the court reversed a conviction of criminal contempt against an attorney who arrived eight minutes late for the reconvening of a trial already in progress. In Farquhar, a recess was taken in the trial at 12:30 p.m. Appellant thereupon requested permission to "go next door" to notify another judge that he would be unable to appear for a bond hearing scheduled for 1:45 p.m. At 1:39 p.m., after consulting with appellant in chambers, the district court allowed appellant to go to the other judge and explain that he would be unable to attend the bond hearing. Appellant did so, but returned eight minutes late, whereupon the district court found appellant in summary contempt under Rule 42(a), F.R.Crim.P.

The court of appeals reversed concluding that appellant's conduct was not sufficiently reckless to warrant a finding of criminal contempt. The court emphasized, however, that (1) the trial judge gave appellant express permission to go to the other courtroom, and (2) there was no evidence that appellant was repeatedly unpunctual. In Re Farquhar, supra, 492 F.2d at 564.

In In Re Niblack, 476 F.2d 930 (D.C. Cir., 1973), cert den. 414 U.S. 909, the appellant was appointed to represent a defendant in a criminal matter. On November 30, 1971, the defendant was arraigned and a motion hearing was scheduled for 9:30 a.m. on December 15, 1971. On the designated date for the hearing, the defendant was present on time, but appellant failed to appear until 11:20 a.m., close to two hours beyond the appointed time. The court, in affirming the conviction for criminal contempt emphasized that the district court had warned the appellant on previous occasions about his tardiness, and therefore concluded that appellant's conduct "was in reckless and wilfull disregard of the court's order that he appear promptly for the scheduled hearing." 476 F.2d at 933.

The instant case is factually similar. On November 25, 1974, appellant failed to appear for trial. The court, though indicating that appellant's conduct would be taken up with the court's Board of Judges, did not hold appellant in contempt nor did it issue a show cause order why appellant should not be held in contempt of court. Pursuant to a letter dated November 26, 1974, Special Attorney Harold Meyerson notified appellant that the trial date had been rescheduled for December 2, 1974. Appellant again failed to appear on December 2, 1974, even though he had been specifically warned that sanctions would be imposed

for his previous failure to appear on November 25th (Govt. App. 14).

Appellant's deliberate failure to appear in federal court cannot be justified on the ground that he had a contemporaneous commitment, the burden of which was voluntarily accepted by appellant, in another court. This is not a case where "his failure to appear was not by design but resulted from a lapse of memory, preoccupation with another case, and confusion as to dates" (emphasis supplied), the reason propounded by the court in Sykes v. United States, supra, 444 F.2d at 930, for concluding that the appellant-attorney did not possess the requisite intent manifested by a reckless disregard of the court's order, to sustain his conviction for criminal contempt.

On the contrary, in this case appellant knew of the scheduled dates for his appearances and chose not to honor his commitments in the federal court. Appellant's failure to appear was clearly by design.

We contend that the circumstances surrounding appellant's deliberate failure to appear were unusual 12/ only in the sense that

12/ In Sykes, the court emphasized that "[t]here were no unusual circumstances justifying a conclusion that [appellant's] conduct was reckless." 444 F.2d at 930.

his anticipated state court trial engagement was known to him sufficiently far in advance of his federal engagement to permit timely notification to Judge Bartels for rescheduling of the federal trial. The action of appellant in giving the district court last minute notice of his state engagement evidences a reckless disregard of his professional duty both to his federal client and to the federal court, sufficient to permit the inference that he intentionally disregarded the district court's order to appear. Thus, notwithstanding appellant's argument that he timely notified the district court on November 20th of his state court engagement, appellant knew as early as November 4, 1974, that trial was scheduled for November 18th in the state case,[13/] and as the district court stressed at the show cause hearing:

> In cases like yours, when they occur, it is customary for counsel to indicate right away, that is not--let's see. On November 20, you telephoned, asked for an adjournment. I just denied that. I couldn't wait until the last minute and grand an adjournment... (A. 14).

13/ On October 3, 1974, trial in the De Simone matter was scheduled to commence on November 18, 1974. Pursuant to agreement made two or three days subsequent to October 3rd between all parties, trial was adjourned until November 25, 1974. Prior to November 25th appellant was retained to represent John Cerverizzo in a criminal matter in the State Supreme Court of New York. The Cerverizzo case first appeared for trial on October 7, 1974, but was rescheduled to commence on October 24, 1974 (Govt. App. 13). On October 24th trial was again postponed until November 4, 1974 (Id.). On neither October 7th nor October 24th was appellant present in the state court (Id.). On November 4th, trial was definitely scheduled to commence on November 18, 1974, and the jury selection did commence on that date (Id.).

In justification of his deliberate failure to appear, appellant indicated to Judge Bartels that he notified Justice Weinstein of his pending federal trial, but that Justice Weinstein "ordered me to proceed anyway" (A. 21). It is not apparent from the record when appellant notified Justice Weinstein of the conflict, but it is evident that only on November 28th, three days after appellant failed to appear, as ordered, for the district court trial, did Justice Weinstein, through his secretary, attempt to notify Judge Bartels of appellant's state court engagement (A. 13). Additionally, appellant knew that the state case was one involving multiple defendants (A. 12), and presumably that if plea negotiations failed, the case would take several weeks to try. Appellant can hardly argue that he did not recklessly disregard his professional duty to the federal court, and of equal importance, his client, by waiting until the last minute to notify the district court of his conflicting state trial.

Appellant must have realized that a possible conflict would arise between the state and federal trials. He obviously proceeded in the hope that both trials could be so handled to permit his representation as retained counsel in both cases. That this hope did not become a reality cannot excuse his contempt. For appellant to suggest that a deliberate failure to

appear, as ordered, on two separate dates set for trial, can be justified simply because appellant decided to take on another case, the trial of which ended up conflicting with the previously agreed upon date for trial in federal court, is not a sufficient mitigating factor to warrant a finding that appellant did not recklessly flaunt the authority of the district court by refusing to appear for trial as ordered.

Here, appellant suggests that his conduct was more defensible than that of the appellant in Farquhar, supra, n. 11, who arrived eight minutes late for the commencement of trial. But to argue that an attorney's conduct resulting in tardiness of eight minutes can be equated with two intentional failures to appear at trial pursuant to court order, wholly misses the mark. The instant case presents a striking example of an attorney's deliberate disregard of this professional duty to his client and the federal court, and supports a finding that appellant wilfully and recklessly, beyond a reasonable doubt, disregarded two court orders to appear for trial.

CONCLUSION

For the reasons stated, it is respectfully submitted that appellant's conviction for criminal contempt should be affirmed.

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Eastern District of New York.

JEROME M. FEIT,
KENNETH A. HOLLAND,
Attorneys.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of this Brief for Appellee have this day been mailed to Gerald L. Shargel, Esquire, LaRossa, Shargel & Fischetti, 522 Fifth Avenue, New York, New York 10036, counsel for Appellant.

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Dated this 9th day of May, 1975.